

1 Melvin B. Pearlston (SBN 54291)
2 Robert B. Hancock (SBN 179438)
3 PACIFIC JUSTICE CENTER
4 50 California Street, Suite 1500
5 San Francisco, California 94111
6 Telephone: (415) 310-1940
7 e-mail: rbh@lawyer.com

8 Attorneys for Plaintiff

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10 **SUPERIOR COURT OF CALIFORNIA**
11 **COUNTY OF SAN FRANCISCO**

12 ERIKA MCCARTNEY, in the public interest,

13 Plaintiff,

14 v.

15 PALKO DISTRIBUTING CO., INC.; IHERB,
16 INC.; and DOES 1 through 500, inclusive,

17 Defendants.

CIVIL ACTION NO.

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

[Cal. Health and Safety Code
Sec. 25249.6, *et seq.*]

1 Erika McCartney, in the public interest, based on information and belief, except for
2 information pertaining directly to Plaintiff, hereby makes the following allegations.

3
4 **INTRODUCTION**

5 1. This Complaint seeks to remedy Defendants' continuing failure to adequately warn
6 individuals in California that they are being exposed to cadmium and lead, chemicals known to the
7 State of California to cause birth defects and other reproductive harm. Such exposures have occurred,
8 and continue to occur, through the manufacture, distribution, sale and consumption of "Sprout Living
9 Epic Protein Powder, Chocolate Maca" (the "Product.") The Product is available through a multitude
10 of retail channels including, without limitation: (a) via the internet through third-party retail
11 websites; and (b) directly at certain Defendants' online stores. Consumers are exposed to cadmium
12 and lead when they consume the Product.
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14 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et seq.*, it is
15 unlawful for businesses to knowingly and intentionally expose individuals in California to chemicals
16 known to the State to cause cancer, birth defects or other reproductive harm without providing clear
17 and reasonable warnings to individuals prior to their exposure. Defendants introduce a product
18 contaminated with cadmium and lead into the California marketplace, exposing consumers of the
19 Product to cadmium and lead.
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21 3. Despite the fact that the Defendants expose consumers to cadmium and lead, during
22 the relevant period, Defendants provides no clear and reasonable warning about the reproductive
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1 hazards associated with cadmium and lead exposure. Defendants' conduct thus violates the warning
2 provision of Proposition 65, Health & Safety Code § 25249.6.

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4 **PARTIES**

5 4. Plaintiff brings this enforcement action in the public interest pursuant to Health &
6 Safety Code § 25249.7(d).

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8 5. Defendants PALKO DISTRIBUTING CO., INC. and IHERB, INC are persons in the
9 course of doing business within the meaning of Health & Safety Code § 25249.11. Defendants
10 manufacture, distribute and/or sell the Product to or in California.

11 6. The true names of DOES 1 through 500 are unknown to Plaintiff at this time. When
12 their identities are ascertained, the Complaint shall be amended to reflect their true names.

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14 **JURISDICTION AND VENUE**

15 7. The Court has jurisdiction over this action pursuant to Health & Safety Code §
16 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to California
17 Constitution Article VI, Section 10, because this case is a cause not given by statute to other trial
18 courts.

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20 8. This Court has jurisdiction over Defendants as business entities that d sufficient
21 business, have sufficient minimum contacts in California or otherwise intentionally avail themselves
22 of the California market through the sale, marketing or use of the Product in California and/or by
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1 having such other contacts with California so as to render the exercise of jurisdiction over them by
2 the California courts consistent with traditional notions of fair play and substantial justice.

3 9. Venue is proper in San Francisco County Superior Court because one or more of the
4 violations arise in the County of San Francisco, and at least one Defendant has not designated a
5 principal office in California.

6 **BACKGROUND FACTS**

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8 10. The People of the State of California have declared by initiative under Proposition 65
9 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other
10 reproductive harm.” Proposition 65 § 1(b).

11 11. To effectuate this goal, Proposition 65 prohibits exposing people to chemicals listed
12 by the State of California as known to cause cancer, birth defects or other reproductive harm above
13 certain levels without a “clear and reasonable warning” unless the business responsible for the
14 exposure can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6 states,
15 in pertinent part:
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17 No person in the course of doing business shall knowingly and intentionally expose
18 any individual to a chemical known to the state to cause cancer or reproductive
toxicity without first giving clear and reasonable warning to such individual

19 12. On May 1, 1997, the State of California officially listed cadmium as a chemical known
20 to cause reproductive toxicity. Cadmium is specifically identified as a reproductive toxicant under
21 two subcategories: “developmental reproductive toxicity,” which means harm to the developing
22 fetus, and “male reproductive toxicity,” which means harm to the male reproductive system. 27
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1 California Code of Regulations ("C.C.R.") § 27001(c). On May 1, 1998, one year after it was listed
2 as a chemical known to cause reproductive toxicity, cadmium became subject to the clear and
3 reasonable warning requirement regarding reproductive toxicants under Proposition 65.

4 13. On February 27, 1987, the State of California officially listed Lead as a chemical
5 known to cause reproductive toxicity. Lead is specifically identified as a reproductive toxicant under
6 three subcategories: "developmental reproductive toxicity," which means harms to the developing
7 fetus, "female reproductive toxicity," which means harm to the female reproductive system, and
8 "male reproductive toxicity," which means harm to the male reproductive system. 27 California
9 Code of Regulations ("C.C.R.") § 27001(c). On February 27, 1988, one year after it was listed as a
10 chemical known to cause reproductive toxicity, lead became subject to the clear and reasonable
11 warning requirement regarding reproductive toxicants under Proposition 65. *Ibid.*; Health & Safety
12 Code § 25249.10(b).
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14 14. The level of exposure to a chemical causing reproductive toxicity under Proposition
15 65 is determined by multiplying the level in question times the reasonably anticipated rate of
16 exposure for an individual to a given medium. 27 C.C.R. § 25821(b). For exposures to consumer
17 products, the level of exposure is calculated using the reasonably anticipated rate of intake or
18 exposure for average users of the consumer product. 27 C.C.R. § 25821(c)(2).
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20 15. The Product contains sufficient quantities of cadmium and lead such that consumers
21 who consume the Product are exposed to cadmium and lead. The primary route of exposure for the
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1 violations is direct ingestion when consumers orally ingest the Product. These exposures occur in
2 homes, workplaces and everywhere in California where the Product is consumed.

3 16. During the relevant one-year period herein, no clear and reasonable warning was
4 provided with the Product regarding the reproductive hazards of cadmium and lead.

5 17. Any person acting in the public interest has standing to enforce violations of
6 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid 60-
7 Day Notice of Violation and such public enforcers are not diligently prosecuting the action within
8 such time. Health & Safety Code § 25249.7(d).

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10 18. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff provided
11 a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General, the District
12 Attorneys of every county in California, the City Attorneys of every California city with a population
13 greater than 750,000 and to the named Defendants. In compliance with Health & Safety Code §
14 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following information: (1) the name
15 and address of each violator; (2) the statute violated; (3) the time period during which violations
16 occurred; (4) specific descriptions of the violations, including (a) the routes of exposure to cadmium
17 and lead from the Product, and (b) the specific type of Product sold and used in violation of
18 Proposition 65; and (5) the name of the specific Proposition 65-listed chemical that is the subject of
19 the violations described in each Notice.
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21 19. Plaintiff also sent a Certificate of Merit for each Notice to the California Attorney
22 General, the District Attorneys of every county in California, the City Attorneys of every California
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1 city with a population greater than 750,000 and to each named Defendant. In compliance with Health
2 & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each Certificate certified that Plaintiff's counsel:
3 (1) has consulted with one or more persons with relevant and appropriate experience or expertise
4 who reviewed facts, studies or other data regarding the exposures to cadmium and lead alleged in
5 each Notice; and (2) based on the information obtained through such consultations, believes that there
6 is a reasonable and meritorious case for a citizen enforcement action based on the facts alleged in
7 each Notice. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each
8 Certificate served on the Attorney General included factual information - provided on a confidential
9 basis - sufficient to establish the basis for the Certificate, including the identity of the person(s)
10 consulted by the Plaintiff's counsel and the facts, studies or other data reviewed by such persons.
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12 20. None of the public prosecutors with the authority to prosecute violations of
13 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against any
14 Defendant under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each of
15 Plaintiff's Notices.
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17 21. Defendants know and intend that individuals will consume the Product, thus exposing
18 them to cadmium and lead.

19 22. Under Proposition 65, an exposure is "knowing" where the party responsible for such
20 exposure has:

21 knowledge of the fact that a[n] ... exposure to a chemical listed pursuant
22 to [Health & Safety Code § 25249.8(a)] is occurring. No knowledge that
23 the ... exposure is unlawful is required.
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1 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
2 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
3 12201).

4 23. Defendants have further been informed of the cadmium and lead in the Product by the
5 60-Day Notice of Violation and accompanying Certificate of Merit served on it.

6 24. Defendants also have constructive knowledge that the Product contains cadmium and
7 lead due to the widespread media coverage concerning the problem of cadmium and lead in consumer
8 products in general, and, in particular, cocoa and cacao products.

9 25. As entities that manufacture, import, distribute and/or sell the Product for use in the
10 California marketplace, Defendants know or should know that the Product contains cadmium and
11 lead, and that individuals who consume the Product will be exposed to cadmium and lead. The
12 cadmium and lead exposures to consumers who consume the Product are a natural and foreseeable
13 consequence of Defendant placing the Product into the stream of commerce.

14 26. Nevertheless, on information and belief, Defendants continues to expose consumers
15 to cadmium without prior clear and reasonable warnings regarding the reproductive hazards of
16 cadmium.

17 27. Plaintiff has engaged in good-faith efforts to resolve the claims alleged herein prior to
18 filing this Complaint by way of her 60-day Notices.

19 28. Any person "violating or threatening to violate" Proposition 65 may be enjoined in
20 any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to violate" is
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1 defined to mean "to create a condition in which there is a substantial probability that a violation will
2 occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil penalties not to
3 exceed \$2,500 per day for each violation of Proposition 65.

4 **CAUSE OF ACTION**

5 **(Violations of the Health & Safety Code 25249.6)**

6 29. Plaintiff restates and realleges paragraphs 1 through 28, inclusive, as though fully set
7 forth herein.
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9 30. By placing the Product into the stream of commerce, Defendants are persons in the
10 course of doing business within the meaning of Health & Safety Code § 25249.11.

11 31. Cadmium and lead are chemicals listed by the State of California as known to cause
12 birth defects and other reproductive harm.

13 32. Defendants know that use of the Product will expose users of the Product to cadmium
14 and lead. Defendants intend that the Product be used in a manner that results in exposures to cadmium
15 and lead from the Product.
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17 33. On information and belief, Defendants have failed to provide clear and reasonable
18 warnings regarding the reproductive toxicity of cadmium to users of the Product.

19 34. By committing the acts alleged above, Defendants have at times relevant to this
20 Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to cadmium
21 and lead without first giving clear and reasonable warnings to such individuals regarding the
22 reproductive toxicity of cadmium and lead.
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PRAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment against Defendants as follows:

1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess civil penalties against Defendants in the amount of up to \$2,500 per day for each violation of Proposition 65;

2. That the Court, pursuant to Health & Safety Code § 25249.7(a), preliminarily and permanently enjoin Defendants from offering the Product for sale in California without either reformulating the Product such that no Proposition 65 warnings are required or providing prior clear and reasonable warnings, as Plaintiff shall specify in further application to the Court;

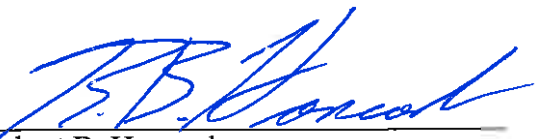
3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order Defendants to take action to stop ongoing unwarranted exposures to cadmium resulting from use of Product sold, as Plaintiff shall specify in further application to the Court;

4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other applicable theory or doctrine, grant Plaintiff her reasonable attorneys' fees and costs of suit; and

5. That the Court grant such other and further relief as may be just and proper.

Dated: March 7, 2018.

PACIFIC JUSTICE CENTER

By: 
Robert B. Hancock
Attorneys for Plaintiff